

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs December 20, 2005

STATE OF TENNESSEE v. FREDERICK LEON TUCKER

Direct Appeal from the Criminal Court for Davidson County
No. 2003-A-492 Monte Watkins, Judge

No. M2005-00839-CCA-R3-CD - Filed March 7, 2006

The defendant, Frederick Leon Tucker, was convicted by jury of rape of a child. As a result, he received a sentence of twenty-one years. On appeal, the defendant presents five issues for review: (1) whether the evidence was sufficient to convict him of rape of a child; (2) whether the trial court erred in admitting the expert testimony of the nurse practitioner who examined the victim; (3) whether the trial court abused its discretion in admitting the victim's statements to a psychologist; (4) whether the trial court erred in admitting the rape kit because the chain of custody was not sufficiently established; and (5) whether the trial court erred in instructing the jury on child rape. Upon review of the record and the parties' briefs, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which DAVID H. WELLES and JOHN EVERETT WILLIAMS, JJ., joined.

Emma Rae Tennent (on appeal), Nashville, Tennessee, and Jonathan F. Wing, and Jennifer T. Lichstein (at trial), Nashville, Tennessee, for the appellant, Frederick Leon Tucker.

Paul G. Summers, Attorney General and Reporter; David E. Coenen, Assistant Attorney General; Victor S. Johnson III, District Attorney General; and Brian Holmgren, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTUAL BACKGROUND

The following substantial evidence was presented at trial. The victim, then age ten, testified that she was born on September 30, 1994. On December 25, 2002, she, her sister, and her father were visiting the home of Ms. Cynthia Tucker, her father's ex-girlfriend. The victim also explained that the defendant was Ms. Tucker's son. After spending Christmas Day at Ms. Tucker's home, the victim, her sister and father spent the night. According to the victim, she and her sister slept

downstairs in the living room with the defendant's daughter while her father, Ms. Tucker, and the defendant's sister slept in the upstairs rooms of the house. The victim shared a couch with her sister. The victim fell asleep but woke up after hearing a knock on the door. At that time, the defendant's daughter got up and opened the door, letting the defendant into the house. The victim went back to sleep but awoke after the defendant moved her sister off the couch and placed her on the floor. The defendant then approached the victim and pulled down her panties.

As the victim explained, she was wearing a long t-shirt and panties. She was lying on the couch on her stomach. After the defendant pulled down her panties, he pulled down his pants and got on top of her with his stomach on her back. According to the victim, the defendant then moved his penis inside her butt. The victim stated that she could not remember how long the defendant moved his penis, but recalled that "it hurt" and that her panties felt wet afterward. The victim said that the defendant then told her not to tell or "the doctor was going to stick a lot of needles in [her]." The victim stated that during the rape, she did not cry out and no one woke up to discover what was going on. Afterward, the defendant pulled the victim's panties up and told her to go upstairs and use the bathroom. The victim went upstairs, but instead of going to the bathroom, she went to the bedroom and woke up her father. Upon waking him up, the victim told her father what the defendant did to her and her father took her to the hospital.

The victim was shown a drawing of a naked man and circled the penis to indicate what she meant by the word "penis." The victim was also shown a drawing of a naked girl, and the victim circled the girl's buttocks to indicate where the defendant inserted his penis. The victim indicated from pictures taken of the interior of Ms. Tucker's house where she slept and demonstrated with a doll her sleeping position on the couch when the defendant raped her. The victim then identified the defendant in the courtroom as the man who raped her. On cross-examination, the victim stated she did not remember telling the lady at the hospital that the defendant put his penis on top of her butt. Rather, the victim stated affirmatively that the defendant's penis touched inside her butt.

Jonathan Hodges Jr., the victim's father, testified that he was awakened from sleep by his daughter. She was "hollering, daddy, come here." Mr. Hodges stated that he put on his clothes and opened the bedroom door to see what his daughter wanted. Immediately after opening the door, he noticed his daughter standing right outside the bedroom. She appeared "scared" and "she was crying, talking in a crying type voice." His daughter then told him that the defendant "put his thang in her butt," and her "butt was hurting." Mr. Hodges asked his daughter where the defendant was and she told him that he had left the house. After asking a few more questions about what happened, Mr. Hodges took his daughter to the bathroom and examined her. Upon his examination, he noticed some "liquidy substance on her butt and in her panties," which appeared to him to be "sperm." Mr. Hodges testified that at this time he placed his daughter's panties in a plastic bag and woke up Ms. Tucker whereupon his daughter told Ms. Tucker what had happened.

Mr. Hodges testified that he told his daughter not to wash up because he wanted to "get evidence." Mr. Hodges stated that while he was still at Ms. Tucker's home, the defendant called. Mr. Hodges recalled that the defendant admitted to being at Ms. Tucker's house late that night, but

denied raping his daughter. Mr. Hodges then told the defendant that he was taking his daughter to the hospital. According to Mr. Hodges, he took his daughter to Baptist Hospital. At Baptist, he gave the panties to a nurse. However, after asking his daughter a few questions and conducting a brief examination, the nurse told him that he needed to go to General Hospital in order to get the rape test. Mr. Hodges was also told that a detective had been called. Mr. Hodges recalled waiting for the detective at Baptist Hospital, then going to General Hospital. At General Hospital, “two ladies” performed the rape kit examination.

Dr. Maureen Sanger, a psychologist with Our Kids Center in Nashville, testified that she interviewed the victim in preparation for the victim’s medical examination. Dr. Sanger explained that the purpose of the interview was to “gather a medical history from the child, and prepare the child for the medical exam.” Dr. Sanger testified that she had participated in approximately 1,400 medical examinations of children who were alleged victims of sexual abuse. Dr. Sanger stated that she conducted these interviews in order to “help us make decisions about what we needed to do during the exam.” According to Dr. Sanger, she interviewed the victim in the early morning hours of December 26, 2002 at the emergency room of General Hospital. The victim was “asleep in the little conference room” when Dr. Sanger met with her. Accordingly, Dr. Sanger described the victim in her report as “passively cooperative” and noted that the victim was “tired.”

Dr. Sanger testified that despite being tired, the victim gave detailed answers about her medical history. The victim told Dr. Sanger that she had received stitches under her chin after falling off her bike, had broken her finger after getting it caught in a grill, and recently had a cold. When Dr. Sanger asked about what events transpired on December 25, 2002, the victim indicated that she had told her dad the previous night that “he was messing with me.” Dr. Sanger then testified to the following:

When I asked [the victim] how [the defendant] had messed with her and what she meant by that, she initially did not respond, she looked away. So I asked if [the defendant] had touched her and she nodded yes. I asked her what he had touched her with and she said his hand. And that his hand had touched, quote, my butt, unquote. She said that his hand touched her butt on the inside of her panties. And I asked her if [the defendant] touched her butt with anything other than his hand. And at that point she said no, and then she said yes, and then she paused several seconds. And she subsequently told me that his private part touched in the inside of her butt.

She indicated that that was painful, that her butt was still hurting at the time I was talking with her. And that was the types of contact. She denied any contact to her genital area when I asked her specifically about that.

Dr. Sanger also asked the victim “if anything came out of [the defendant’s] private part,” and the victim told her “yeah, it’s on my panties.” Dr. Sanger then explained that an eight-year-old child would understand the difference between inside and outside as it relates to body parts. Dr. Sanger stated that she remained with the victim during the physical examination.

On cross-examination, Dr. Sanger acknowledged that the victim was slow in responding to questions and at times was not able to give detailed answers to questions. Dr. Sanger also acknowledged that the victim did not volunteer much information until she was asked a specific question. On redirect examination, Dr. Sanger stated that it was not unusual for children to be reluctant to talk about matters involving sexual contact. Dr. Sanger also stated that she explains to the children “to be truthful in their responses because we base some of our medical care and decisions on what they tell us.”

Sue Ross, a pediatric nurse practitioner at the Our Kids Center, testified that after reviewing the information gathered by Dr. Sanger, she conducted the physical examination of the victim. According to Ms. Ross, the victim’s examination revealed “no acute injury to this child, neither genitally, nor anally.” However, she stated that the absence of injury to the victim’s anal region did not rule out the possibility of penetration due to the elasticity of the anus. She explained that in most cases a finding of “rectal penetration” is very rare. “The greater likelihood . . . even when we are examining children in puberty, is that there is absolutely no physical finding.” As a result, Ms. Ross testified that her findings in connection with the physical examination were not inconsistent with the information gathered by Dr. Sanger. On cross-examination, Ms. Ross reiterated that her examination could neither confirm nor deny the possibility of sexual penetration.

Ms. Ross testified that she collected forensic evidence in a rape kit as part of the physical examination of the victim. She stated that she used swabs to collect any DNA specimens from inside and outside of the victim’s anal area and labeled them appropriately. She also stated that after she collected the specimens for the rape kit, she sealed the kit and placed it in a locked cabinet.

Detective Kevin Cooley testified that after meeting the victim and her father at Baptist Hospital around 1:00 a.m., he accompanied them to General Hospital. At General Hospital, he received a brown paper bag containing the victim’s panties, which was subsequently placed together with the rape kit and documented. According to Detective Cooley, he personally took the bag containing the panties to the police property room. The evidence was then assigned a property number and eventually taken to the Tennessee Bureau of Investigation (TBI) to be analyzed. Detective Cooley stated that the rape kit was stored in a locked cabinet at General Hospital. He stated that he collected the rape kit from the hospital a day or two after the crime and took it to the property room where it was assigned a property number. Detective Cooley explained that the rape kit was sealed at the hospital to prevent tampering. Detective Cooley recalled that he personally transported the evidence to the TBI.

Detective Cooley testified that he spoke with the defendant on February 26, 2003 and requested a blood sample for DNA testing. He stated that the defendant first agreed, then changed his mind and refused to provide the sample. However, after Detective Cooley procured a warrant, the defendant’s blood sample was taken and sent to the TBI for analysis.

On cross-examination, Detective Cooley acknowledged that Detective Keith Sutherland actually picked up the rape kit from General Hospital. Detective Cooley apologized and indicated

that he was mistaken when he said he had picked up the rape kit from General Hospital. Detective Cooley asserted, however, that the rape kit “was stored at General Hospital until Detective Sutherland picked it up and brought it back.” Detective Cooley stated that on January 24, 2003, he took the rape kit from the property room and personally transported it to the TBI for analysis. He said that the rape kit was “unopened and undamaged” when removed from the property room. He also emphasized that the rape kit had multiple seals to preserve the integrity of the evidence. He explained that after the rape kit was analyzed, he retrieved it and returned it to the property room.

Detective Keith Sutherland testified as to the chain of custody of the victim’s rape kit. He testified that he personally transported the victim’s rape kit from the locked storage cabinet at General Hospital to the police department on January 7, 2003. He explained that the victim’s rape kit was sealed when he picked it up, and he did not tamper with or alter that seal in any way while transporting it.

Special Agent Hunter Green, a forensic scientist with the TBI crime laboratory, testified that she received a sealed brown paper bag containing some underwear and a sealed rape kit. According to Agent Green, the rape kit included the victim’s information sheet, a tube of the victim’s blood, rectal swabs, perirectal swabs, and gluteal cleft swabs. The swabs were sealed, separately, with a label containing the victim’s information. The brown paper bag was also labeled with the patient’s name. Regarding the rape kit, Agent Green stated that “[t]here had been no tampering, no opening prior to my receiving it.” Agent Green explained that her preliminary examination of the swabs revealed the presence of sperm cells. Later, upon receipt of the defendant’s blood sample, Agent Green conducted a DNA analysis of the sample. Agent Green stated that after she conducted a DNA comparison analysis on the swabs as a whole, the DNA recovered from the swabs matched the DNA from the defendant’s blood sample. After conducting a DNA comparison analysis on each swab separately, Agent Green explained that the “DNA profile obtained from the perirectal and gluteal cleft swabs matched [the defendant]” to a scientific certainty “greater than the world’s population.” Agent Green said that she did not conduct any testing of the victim’s panties because of her earlier positive findings of DNA extracted from the swabs.

After hearing the evidence, the jury convicted the defendant of rape of a child, a Class A felony. The defendant was subsequently sentenced to twenty-one years in the Department of Corrections to be served at 100% as a child rapist.

ANALYSIS

I. Sufficiency of the Evidence

The defendant contends that the evidence was insufficient to support his conviction for rape of a child. Specifically, the defendant contends that the evidence at trial did not support the jury’s finding that “the contact he made with the victim constituted anal penetration as required to sustain his conviction.”

Our review begins with the well-established rule that once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced with a presumption of guilt. *State v. Evans*, 838 S.W.2d 185, 191 (Tenn. 1992). Therefore, on appeal, the convicted defendant has the burden of demonstrating to this court why the evidence will not support the jury's verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000); *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). To meet this burden, the defendant must establish that no "rational trier of fact" could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *State v. Evans*, 108 S.W.3d 231, 236 (Tenn. 2003); Tenn. R. App. P. 13(e). In contrast, the jury's verdict approved by the trial judge accredits the state's witnesses and resolves all conflicts in favor of the state. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). The state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn from that evidence. *Carruthers*, 35 S.W.3d at 558. Questions concerning the credibility of the witnesses, conflicts in trial testimony, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). We do not attempt to re-weigh or re-evaluate the evidence. *State v. Reid*, 91 S.W.3d 247, 277 (Tenn. 2002). Likewise, we do not replace the jury's inferences drawn from the circumstantial evidence with our own inferences. *Id.*

To establish rape of a child, the state was required to prove "unlawful sexual penetration of a victim by the defendant or the defendant by a victim, if such victim is less than thirteen (13) years of age." Tenn. Code Ann. § 39-13-522(a). Sexual penetration is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, *however slight*, of any part of a person's body or of any object into the genital or anal openings of the victim's, the defendant's, or any other person's body, but emission of semen is not required." Tenn. Code Ann. § 39-13-501(7) (emphasis added).

After considering the evidence in the light most favorable to the state, we conclude that the evidence was sufficient to support the defendant's conviction of rape of a child. At trial, the victim's testimony clearly established that the defendant penetrated the inside of her buttocks with his penis when she was eight years old. The victim clearly described the circumstances of the rape and specifically identified the area of physical contact between her and the defendant. In addition, the victim's testimony was corroborated by the testimony of the victim's father and Dr. Sanger. Both witnesses testified that the victim told them the defendant placed his private part inside her butt. Furthermore, the victim's testimony concerning her rape was corroborated by DNA testing of the defendant's sperm, which was taken from the victim's anal region. Therefore, the evidence overwhelming supports the defendant's conviction and this issue is without merit.

II. Admission of Expert Testimony

The defendant contends that the trial court erred in admitting the expert testimony of Sue Ross, the nurse practitioner who examined the victim. Specifically, the defendant argues that the trial court erred in admitting Ms. Ross's opinion that the victim's physical examination neither confirmed nor denied the possibility of sexual penetration. The defendant cites *McDaniel v. CSX*

Transp., Inc., 955 S.W.2d 257 (Tenn. 1997) and asserts that the trial court abandoned its gatekeeper function by allowing Ms. Ross to testify before determining the reliability of her opinion. The defendant asserts that Ms. Ross's opinion was not reliable because no evidence was presented as to whether her opinion was subject to peer-reviewed studies, generally accepted in the scientific community, and subject to a potential rate of error. The state argues that the defendant waived this issue for appellate review by failing to make a contemporaneous objection at trial to Ms. Ross's testimony as an expert witness. In the alternative, the state argues that the trial court did not err in allowing Ms. Ross's to give her opinion regarding the victim's physical examination.

In most cases, the failure to raise a contemporaneous objection to the admission of evidence at the time the evidence is introduced at trial results in waiver of the particular issue on appeal. *See* Tenn. R. App. P. 36(a); *State v. Thompson*, 36 S.W.3d 102, 108 (Tenn. Crim. App. 2000). However, an objection is considered contemporaneous if counsel makes the objection in a motion in limine and the particular issue is considered and ruled upon. *State v. Alder*, 71 S.W.3d 299, 302 (Tenn. Crim. App. 2001). In such cases, counsel is not required to make repetitious objections to issues which have been previously ruled upon in order for that issue to be preserved for appeal. *Id.* Nonetheless, counsel must be vigilant to object contemporaneously to issues which are only tentatively suggested or incompletely developed in connection with a motion in limine, otherwise, counsel risks waiver of the issue on appeal. *Id.*; *see also State v. McGhee*, 746 S.W.2d 460, 462 (Tenn. 1988).

Although the record reflects that the defendant did not contemporaneously object to the qualification of Ms. Ross as an expert witness and her subsequent testimony, the record reflects that this particular issue was raised in a motion in limine, discussed by the parties, and ruled upon by the trial court. Therefore, we will address the issue on the merits.

The decision to admit expert testimony is within the discretion of the trial court and will not be disturbed absent an abuse of discretion. *Coe v. State*, 17 S.W.3d 193, 226-27 (Tenn. 2000); *State v. Ballard*, 855 S.W.2d 557, 562 (Tenn. 1993). "The abuse of discretion standard contemplates that before reversal the record must show that a judge 'applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining.'" *State v. Coley*, 32 S.W.3d 831, 833 (Tenn. 2000) (quoting *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999)).

Rule 702 and 703 of the Tennessee Rules of Evidence governs the admissibility of expert testimony and serves to screen out expert opinions that are based on untrustworthy facts or that do not substantially assist the trier of fact in determining an issue. *See McDaniel*, 955 S.W.2d at 266. Tennessee Rule of Evidence 702 provides:

If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

In addition, Tennessee Rule of Evidence 703 requires the expert's opinion to be supported by trustworthy facts or data "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Several non-definitive factors may be considered by the trial court when evaluating the reliability of the expert's opinion: (1) whether the data and the methodology upon which the expert formulates an opinion has been tested; (2) whether the evidence has been subjected to peer review or publication; (3) whether a potential rate of error is known; (4) whether the evidence is generally accepted in the community involved in the body of specialized knowledge; and (5) whether the expert's research in the field has been conducted independent of litigation. *McDaniel*, 955 S.W.2d at 265; *see also State v. Stevens*, 78 S.W.3d 817, 834 (Tenn. 2002). However, the application of these factors may or may not be necessary depending upon the issue, the expert's expertise, and the subject of the expert's testimony. *Stevens*, 78 S.W.3d at 833. Indeed, the determining factors are whether the witness is qualified to give an informed opinion on the subject at issue, and whether the reasoning or methodology underlying the expert's opinion is sufficiently reliable. *Id.* at 834. Notably, "the court may make a finding of reliability if the expert's conclusions are sufficiently straightforward and supported by a rational explanation which reasonable [persons] could accept as more correct than not correct." *Id.* (citations and internal quotations omitted).

Upon review of the record, we cannot conclude that the trial court erred in admitting Ms. Ross's opinion that the victim's physical examination neither confirmed nor denied the possibility of sexual penetration. With respect to her qualifications, the record reflects that Ms. Ross had been a pediatric nurse practitioner since 1974 and had received specialized training in her field. Since her employment with Our Kids Center in 1990, she had performed over 3000 physical examinations of children who were allegedly the victims of sexual abuse. Ms. Ross also taught her expertise to nursing residents at Vanderbilt. In addition, Ms. Ross indicated that the examination process of the children was subject to internal review as well as external review by nationally recognized consultants. Ms. Ross estimated that she had testified in over 100 cases in connection with her examinations of children. With respect to the reliability of her opinion, the record reflects that her opinion was based on her personal observations, specialized knowledge, and experience. Ms. Ross personally conducted the physical examination of the victim. Ms. Ross explained that by virtue of her experience a finding of rectal penetration is very rare because of the elasticity of the anal region. Therefore, the fact that the victim's examination revealed no finding of injury did not rule out the possibility of penetration. It is clear from the record that Ms. Ross was qualified to testify as an expert witness and her opinion substantially assisted the jury in understanding the results of the victim's examination at issue. Consequently, this issue is without merit.

III. Admission of the Victim's Out-of-Court Statements

The defendant contends that the trial court erred in admitting the victim's statements made to Dr. Sanger at General Hospital because these statements were not made for the purpose of diagnosis and treatment as required by Rule 803(4) of the Tennessee Rules of Evidence. Citing *State v. McLeod*, 937 S.W.2d 867 (Tenn. 1996), the defendant insists that the particular circumstances surrounding the victim's statements to Dr. Sanger call into question whether the victim understood

and appreciated the fact that the interview took place to aid her diagnosis and treatment because the evidence showed the victim was tired, slow in responding to questions, and offered little detail in response to Dr. Sanger's questions.

In a hearing held outside the presence of the jury, Dr. Sanger testified about the victim's statements. Dr. Sanger explained that it was her role as a psychologist to interview the victim in order to gather information about the victim's medical history and prepare the victim for the medical exam. Dr. Sanger explained that when conducting the interview, she asked the victim age appropriate questions that were not unduly leading or suggestive.

Dr. Sanger testified that prior to interviewing any child, she explains the medical examination to the child and encourages the child to be truthful with his or her answers. She informs the child that she will be asking questions that are relevant to the medical exam, and that the answers the child gives help determine treatment. In gathering the child's medical history, Dr. Sanger also asks the child questions regarding the type of sexual contact the child encountered, the identity of the person responsible for the sexual contact, and the time when the sexual contact occurred. According to Dr. Sanger, the information gathered from these questions helps the nurse or physician assess the child's risk for sexually transmitted diseases and determine medical treatment.

Dr. Sanger conceded on cross-examination, that psychology, not medicine, was her area of expertise and that she was not qualified to prescribe treatment for physical problems. She acknowledged that she spoke to Detective Cooley and the victim's father before interviewing the victim. She also acknowledged that the victim was slow in responding to questions and reluctant to volunteer information. After hearing Dr. Sanger's testimony, the trial court found that the victim's statements were made for the purpose of medical diagnosis and treatment, and therefore, admissible.

The admission of evidence governed by the Tenn. Rules of Evidence rests within the broad discretion of the trial court and will not be disturbed absent an abuse of discretion. *State v. Stinnett*, 958 S.W.2d 329, 331 (Tenn. 1997). As a general rule, statements, which constitute hearsay are inadmissible except as provided by the rules of evidence or other applicable law. Tenn. R. Evid. 802. However, statements made for the purpose of medical diagnosis and treatment are admissible as an exception to the hearsay rule under Tennessee Rules of Evidence 803(4). The exception provides:

Statements made for purposes of medical diagnosis and treatment describing medical history; past or present symptoms, pain, or sensations; or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis and treatment.

The rationale justifying this exception is that statements made for purposes of medical diagnosis and treatment are presumptively trustworthy because a patient is motivated to be truthful in order to receive proper diagnosis and treatment. *McLeod*, 937 S.W.2d at 870. Also, "if physicians or other medical personnel rely upon the statement in diagnosing and treating the patient, then the statement

should be sufficiently trustworthy to be admissible in a court of law.” *Id.* However, the rationale justifying the admission of such statements becomes questionable when the patient is a child and, by virtue of the child’s age or maturity, the child does not understand the need for truthfulness in the medical setting. *Id.* Consequently, when making an admissibility determination under Rule 803(4), the trial court should thoroughly examine all the circumstances surrounding the statement outside the presence of the jury. *Id.* at 869-70. Among the circumstances deserving close scrutiny are: the timing of the statement, the contents of the statement, whether the statement was made in response to suggestive or leading questions, whether the statement was improperly influenced by another, and any other circumstance that may undermine the statement’s trustworthiness such as a custody battle or family feud. *Id.* at 871; *Stinnett*, 958 S.W.2d at 332.

After reviewing the record, it is our view that the trial court properly admitted the victim’s statements to Dr. Sanger. In this case, the victim was interviewed within hours of the alleged sexual abuse. The victim, who was eight-years-old, was informed that she was being questioned in connection with her medical care, and she was encouraged to be truthful in her answers. Although the victim was tired, she responded to questions about her medical history and physical condition, including the fact that she had received stitches under her chin, had broken her finger and recently had a cold. The victim also indicated during the interview that she was still experiencing pain in her butt. The victim’s statements regarding the sexual contact were specific and age appropriate. Moreover, there is no indication, that the victim was improperly influenced or motivated to lie about the sexual abuse. In fact, the victim’s statements to Dr. Sanger were consistent with statements made to her father and her testimony at trial. Consequently, we conclude that the trial court did not err in admitting the victim’s statements pursuant to Rule 803(4).

IV. Chain of Custody of the Rape Kit

The defendant challenges the chain of custody of the physical evidence contained in the rape kit. He submits that the state failed to establish a complete chain of custody for the rape kit; and therefore, the rape kit was not properly authenticated under Tennessee Rule of Evidence 901(a).

Rule 901(a) requires that, prior to the introduction of physical evidence, a witness must be able to identify the evidence or establish an unbroken chain of custody. *State v. Holbrooks*, 983 S.W.2d 697, 701 (Tenn. Crim. App. 1998); *State v. Goodman*, 643 S.W.2d 375, 381 (Tenn. Crim. App. 1982). “The purpose of the chain of custody is to ‘demonstrate that there has been no tampering, loss, substitution, or mistake with respect to the evidence.’” *State v. Scott*, 33 S.W.3d 746, 760 (Tenn. 2000) (quoting *State v. Braden*, 867 S.W.2d 750, 759 (Tenn. Crim. App. 1993)). However, the state is not required to prove the identity of tangible evidence beyond all possibility of doubt, neither is the state required to exclude every possibility of tampering. *Id.* Rather, “the evidence may be admitted when the circumstances surrounding the evidence reasonably establish the identity of the evidence and its integrity.” *Id.*; see also *State v. Holloman*, 835 S.W.2d 42, 46 (Tenn. Crim. App. 1992). Whether the requisite chain of custody has been sufficiently established is a matter committed to the discretion of the trial judge, and his ruling will not be

reversed on appeal absent a finding of abuse of that discretion. *State v. Beech*, 744 S.W.2d 585, 587 (Tenn. Crim. App. 1987).

After holding a brief hearing outside the presence of the jury, the trial court admitted the rape kit into evidence. In making its ruling, the court stated the following:

Let me first state for the record that obviously I am going to allow that evidence, because I think the circumstance surrounding the evidence reasonably established the identity of the evidence and its integrity So the evidence will be admitted. The chain of custody has been established, in other words.

Upon review, we conclude that the record supports the trial court's findings. At trial, Ms. Ross testified that she examined the victim and placed the forensic evidence collected from the victim in a sealed rape kit on December 26, 2002. Ms. Ross explained that the evidence consisted of the victim's blood sample and medical swabs used in the examination. Ms. Ross stated that she labeled the evidence and placed the kit in a locked cabinet at the hospital. Ms. Ross identified the rape kit at trial as the kit prepared pursuant to her examination of the victim. Detective Sutherland testified that on January 7, 2002, he picked up the rape kit and transported it to the police property room. Detective Cooley testified that on January 24, 2002, he retrieved the victim's rape kit from the police property room and transported it to the TBI for analysis. Detective Cooley stated that the rape kit was sealed, unopened, and undamaged. Agent Green testified that the TBI received the rape kit on January 24, 2002. According to Agent Green, she retrieved the victim's rape kit from the TBI storage vault on February 7, 2003. The rape kit was sealed and included a tube of the victim's blood, swab samples taken from the victim, and the victim's medical history form. Agent Green further stated that the swabs were sealed with a label containing the victim's information. Agent Green explained that after her preliminary examination of the swabs revealed the presence of sperm cells, she resealed the kit and placed it back in the vault. Thereafter, she received the defendant's blood sample and conducted DNA testing on the defendant's blood sample and the sperm cells recovered from the swabs. The DNA profile taken from the swabs matched the DNA extracted from the defendant's blood sample. Agent Green stated that she conducted DNA testing on the contents of the rape kit twice. She explained that after conducting each test, she would re-seal the evidence and place it back into the vault. It is clear from the record that the rape kit was carefully sealed and preserved until it was tested. Accordingly, the trial did not err in admitting the rape kit into evidence.

IV. Jury Instructions

The defendant contends that the trial court erroneously instructed the jury as to the requisite mental state for the offense of rape of a child by including recklessness in the instructions. The defendant submits that the inclusion of recklessness in the instructions impermissibly lowered the state's burden of proof and allowed the jury to convict upon proof of reckless sexual penetration. The state submits that the defendant waived this issue by failing to object to the instructions at trial.

In the alternative, the state asserts that the defendant is not entitled to relief because the instruction given was proper.

A review of the record indicates that the defendant did not object when the trial court instructed the jury on the elements of rape of a child. Instead, the defendant raised this issue in his motion for a new trial. It has long been held that a defendant's failure to timely object, or take any reasonable action to prevent error at trial results in waiver of the issue on appeal, absent plain error. *See State v. Hall*, 8 S.W.3d 593, 603 (Tenn. 1999); *State v. Thornton*, 10 S.W.3d 229, 234 (Tenn. Crim. App. 1999); Tenn. R. App. P. 36(a). However, "[a]n erroneous or inaccurate jury charge, as opposed to an incomplete jury charge, may be raised for the first time in a motion for a new trial and is not waived by the failure to make a contemporaneous objection." *State v. Faulkner*, 154 S.W.3d 48, 58 (Tenn. 2005); *see also State v. Lynn*, 924 S.W.2d 892, 899 (Tenn. 1996); Tenn. R. Crim. P. 30(b).

In criminal cases, a defendant has a right to a correct and complete charge of the law. *State v. Garrison*, 40 S.W.3d 426, 432 (Tenn. 2000). Thus, it follows that the trial court has a duty to give a complete charge of the law applicable to the facts of a case. *State v. Thompson*, 519 S.W.2d 789, 792 (Tenn. 1975). The material elements of each offense should be described and defined in connection with that offense. *See State v. Ducker*, 27 S.W.3d 889, 899 (Tenn. 2000); *State v. Cravens*, 764 S.W.2d 754, 756 (Tenn. 1989). The failure to do so deprives the defendant of the constitutional right to a jury trial and subjects the erroneous jury instruction to harmless error analysis. *Garrison*, 40 S.W.3d at 433-34. However, not all erroneous jury instruction rises to the level of constitutional error. *See Faulkner*, 154 S.W.3d at 58; *see also State v. Lynn*, 924 S.W.2d 892, 899 (Tenn. 1996); *Miller v. State*, 54 S.W.3d 743, 747 (Tenn. 2001). A jury instruction must be reviewed in its entirety and read as a whole rather than in isolation. *State v. Leach*, 148 S.W.3d 42, 58 (Tenn. 2004). A jury instruction is considered "prejudicially erroneous if it fails to fairly submit the legal issues or if it misleads the jury as to the applicable law." *State v. Hodges*, 944 S.W.2d 346, 352 (Tenn. 1997).

Relevant to this issue, the record reflects that the trial court instructed the jury as follows:

Any person who commits the offense of rape of a child is guilty of a crime. For you to find the Defendant guilty of this offense, the State must have proven beyond a reasonable doubt the existence of the following essential elements:

One, that the Defendant had unlawful sexual penetration of the alleged victim or the alleged victim had unlawful sexual penetration of the Defendant. And,

Two, that the alleged victim was less than 13 years of age. And,

Three, that the Defendant acted intentionally, knowingly or recklessly.

The trial court then explained the culpable mental states of intentionally, knowingly, and recklessly as set forth in Tennessee Code Annotated section 39-11-302, defined sexual penetration, and charged the jury on the lesser-included offenses of child rape.

In his appellate brief, the defendant relies heavily on *State v. Weltha Womack*, No. E2003-02332-CCA-R3-CD, 2005 WL 17428 (Tenn. Crim. App., at Knoxville, Jan. 4, 2005). In *Womack*, a panel of this court determined that the trial court erred in instructing the jury on aggravated rape because the mental state of recklessness was included in the instruction. According to the court, aggravated rape was a nature of conduct offense, requiring the sexual penetration of the victim. The *Womack* court, therefore, determined that inclusion of the mental state of recklessness in the jury instruction lessened the state's burden of proof and permitted a conviction based on reckless penetration. As a result, the court concluded that the instruction error was not harmless beyond a reasonable doubt and reversed the defendant's conviction. However, after a thorough review of the relevant law set forth below, we are not persuaded that *Womack's* holding controls the determination of error in this case.

Based upon our review of the record and applicable law, we determine that it was not constitutional error for the trial court to include the mental state of recklessness in the jury instructions for rape of a child. To begin, we note that the offense of rape of a child does not specify a mental state in its statutory definition. *See* Tenn. Code Ann. § 39-13-522. Nonetheless, where a statutory definition “does not plainly dispense with a mental element, intent, knowledge or recklessness suffices to establish the culpable mental state.” Tenn. Code Ann. § 39-11-301(c). Therefore, it follows that the requisite mental state for the offense of rape of a child may be established by evidence of intent, knowledge, or recklessness. *See, e.g., State v. Barney*, 986 S.W.2d 545, 550 (Tenn. 1999)(“Rape of a child requires sexual penetration of the victim, and the mental state required may range from intentional to knowing or reckless.”); *State v. Hill*, 954 S.W.2d 725, 729 (Tenn. 1997)(“Obviously, the act for which the defendant is indicted, ‘unlawfully sexual penetrat[ing]’ a person under the age of thirteen, is committable only if the principal actor’s *mens rea* is intentional, knowing, or reckless).

In *State v. Chester Wayne Walters*, No. M2003-03019-CCA-R3-CD, 2004 WL 2726034, *14 (Tenn. Crim. App., at Nashville, Nov. 30, 2004), we recognized that the offense of rape of a child contains all three conduct elements: nature-of-conduct, result-of-conduct, and circumstances-surrounding-conduct. These conduct elements relate in various degrees to the culpable mental states of intentional, knowing, and reckless. *See generally*, Tenn. Code Ann. § 39-11-302. Also, in the *Walters* case, we stated that the “unlawful sexual penetration of the victim is both nature of the conduct and result of the conduct [offense].” *Id.* at 13; *see also State v. Jennie Bain Ducker*, No. 01C01-9704-CC-00143, 1999 WL 160981 (Tenn. Crim. App., at Nashville, Mar. 25, 1999) (noting that nature of the conduct involves the physical act and that the result of the conduct is the harmful result), *aff’d on other grounds*, 27 S.W.3d 889 (Tenn. 2000); *State v. Michael D. Evans*, No. 03C01-9703-CR-00104, 1997 WL 772910 (Tenn. Crim. App., at Knoxville, Dec. 9, 1997) (stating that “conduct which results in sexual penetration” must be proved intentionally, knowingly, or recklessly), *aff’d on other grounds*, 108 S.W.3d 231 (Tenn. 2003).

Recently, in *State v. Faulkner*, our supreme court discussed at length our decision in *State v. Page*, 81 S.W.3d 781 (Tenn. Crim. App. 2002). In *Page*, this court held that the trial court erred when it instructed the jury on the “knowing” mental state of second degree murder, a result-of-conduct offense, because the instruction included the nature-of-conduct and nature-of-circumstances definitions of knowingly. *Page*, 81 S.W.3d at 788. This court reasoned that a “jury instruction that allows a jury to convict on second degree murder based only upon awareness of the nature of the conduct or circumstances surrounding the conduct improperly lessens the state’s burden of proof. *Id.* This court further concluded the error was not harmless beyond a reasonable doubt because defendant’s culpable mental state was a disputed issue at trial. *Id.* at 789-90.

However, our supreme court in *Faulkner* restricted the holding in *Page*, by concluding that the superfluous conduct language in the “knowingly” definition “did not lessen the burden of proof because it did not relieve the State of proving beyond a reasonable doubt that the defendant acted knowingly.” *Faulkner*, 154 S.W.3d at 59. The supreme court also indicated they were not convinced “that the inclusion of such language is an error of constitutional dimension when the instruction also includes the correct result-of-conduct definition.” *Id.* at 58-9. The supreme court further concluded that the error did not qualify as a misstatement of a material element of the offense, as suggested by *Page*; but rather, the error was harmless. *Id.* at 60.

In consequence, we conclude that the jury instruction fairly defined the issues of law and did not mislead the jury. No specific mental state was assigned to the definition of rape of child; rather, the mental states of intentionally, knowingly, and recklessly were defined separately. Also, given the overwhelming evidence of penetration in this case, the jury was in no danger of being misled as to the elements of child rape. Furthermore, even if the inclusion of the “reckless” definition was error, the error was harmless in that it did not lessen the burden of proof required for rape of a child, and did not affect the outcome of the trial. *See Faulkner*, 154 S.W.3d at 59; Tenn. R. App. P. 36(b) (stating error involving a substantial right must affect the judgment or judicial process); *State v. Gilliland*, 22 S.W.3d 266, 274 (Tenn. 2000) (“The more the proof exceeds that which is necessary to support a finding of guilt beyond a reasonable doubt, the less likely it becomes that an error affirmatively affected the outcome of the trial on its merits.”). Accordingly, this issue is without merit.

J.C. McLIN, JUDGE